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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JON BEELER, Petitioner

v.

JOHN ROUNSAVALL; MARY GAYLE RAMSEY; and THE CITY OF TERRELL, TEXAS, Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in determining that illegitimate animus is necessary for a "class-of-one" equal protection or selective enforcement claim and that Appellant was not "similarly situated" or treated differently than individuals that occupied the site of a convenience store once operated by Appellant.

Appellant respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

LIST OF ALL PARTIES

The persons listed below are all parties to the proceeding in the court whose judgment is sought to be reviewed.

1. **JOHN ROUNSAVALL**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

2. **MARY GAYLE RAMSEY**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

3. **THE CITY OF TERRELL, TEXAS**

Represented at trial by Melissa M. Fletcher and on appeal by Peter Smith, NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., 1800 Lincoln Plaza, 500 North Akard, Dallas, Texas 75201.

4. **JON BEELER**

Represented at trial and on appeal by Michael P. Wortham, NACOL, WORTHAM & ASSOCIATES, P.C., 990 South Sherman Street, Richardson, Texas 75081.

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Abbreviations

"R" refers to the appellate record and the number that follows refers to the page cited in the record.

"TR" refers to the Transcript of Motions (Defendants' motion for summary judgment) Hearing Before the Honorable Barbara M.G. Lynn, United States District Judge, held on February 11, 2002

"R 249" refers to Appellees' Appendix to their motion for summary judgment and consists of pages 1a-1d (table of contents) and pages 1-286 (affidavits and supporting evidence)

"R 297" refers to Appellant's Appendix to his response to the motion for summary judgment and consists of pages 1a-1c (table of contents) and pages 1-56 (affidavits and supporting evidence)

"JB Depo" refers to the Oral Deposition of Jon Beeler

"MGR Depo" refers to the Oral Deposition of Mary Gayle Ramsey

"JR Depo" refers to the Oral Deposition of John Rounsavall

"HR Depo" refers to the Oral Deposition of Humberto Rodriguez

"GL Depo" refers to the Oral Deposition of Grady Lawson

IN THE SUPREME COURT OF THE UNITED STATES

JON BEELER, Petitioner

v.

JOHN ROUNSAVALL; MARY GAYLE RAMSEY; and THE CITY OF TERRELL, TEXAS, Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is unreported. The opinion of the district court is unreported.

JURISDICTION

The Court of Appeals entered its judgment on May 7, 2003 (App., infra 1A-7A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are as follows: 18 U.S.C. § 2; 21 U.S.C. § 841(a)(1), d; 21 U.S.C. §841(b)(1)(A)(B); 21 U.S.C. § 846.

STATEMENT OF FACTS

A. Background and Course of Proceedings

From 1990 until approximately March 15, 2000, Appellant Jon Beeler rented real property located at 307 Ninth Street, Terrell, Texas, ("Location A") from Grady Lawson ("Lawson") and operated a convenience store known as Handy Mart at Location A. Appellant sold a variety of food and beverages at the site, including beer and wine and related items, and held a valid Wine and Beer Retailer's Off-Premises Permit. R 250; R 249/57 (JB Depo 11:13-17), 59 (JB Depo 19:2-13), 153 (GL Depo 10:21-25), 155 (GL Depo 20:21-23), 164 (GL Depo 54:608); R 297/1 (JB Aff 2).

In December 1999, Appellant decided to relocate Handy Mart from Location A to 305 Ninth Street, Terrell, Texas ("Location B"). R 249/62 (JB Depo 32:11-23), 63 (JB Depo 33:1-6, 33:16-23), and 35:19 through 36:25); R 251; R 297/4.

On January 6, 2000, Appellant applied for a Wine and Beer Retailer's Off-Premise Permit (hereinafter referred to as "permit") for Location B from the City, the Texas Alcoholic Beverage Commission and Kaufman County. R 297/8-18. Appellant complied with all procedures and approvals necessary for and applicable to said applications and license or permit. The City issued Appellant a "Wine and Beer Retailer's Off-Premise Permit" for Location B on or about January 11, 2000, which confirmed that the City had certified Appellant's application for a permit for Location B. R 249/3-6, 66 (JB Depo 45:20 through 46:7), 100, 115 (JR Depo 51:1-8), 118 (JR Depo 62:14-16); R 251; R 297/2 (JB Aff 5).

In reliance upon the granting of this permit, Appellant purchased the property at Location B for the sum of $100,000 on January 12, 2000. R 249/72 (JB Depo 70:6-15), 283; R 251.

In preparation for the move, on January 4, 1998 and January 29, 1998, Appellant had mailed two letters to Appellee Mary Gayle Ramsey ("Ramsey"), the city attorney for the City of Terrell, Texas,

(R 297/4-7) and placed several telephone calls to Appellee Ramsey in an attempt to ascertain whether it would be possible to obtain a beer and wine permit at Location B. Appellee Ramsey did not respond to the letters or the calls. R 249/79-80 (JB Depo 100:5 through 101:14); R 297/2 (JB Aff 3). Thereafter in 1998, at Appellant's request, Winston Smith ("Smith"), an employee of Appellant, began calling the City in an attempt to determine whether it would be possible to obtain a permit at Location B. R 249/80 (JB Depo 102:3-6). Smith was told by Appellee John Rounsavall ("Rounsavall), city secretary for the City of Terrell, Texas, in early 1998 that the issuance of a permit at Location B would not violate any City ordinances. R 249/79-80 (JB Depo 98:24 through 99:1-5); R 251-252. Rounsavall's statement to Smith coupled with the grant of Appellant's application for a Wine and Beer Retailer's Off-Premise Permit by the City assured him that the City would not oppose his application. R 249/58 (JB Depo 13:18 through 14:15), 66 (JB Depo 46:5 through 50:13); R 252; R 297/2 (JB Aff 6).

In late January 2000, Lawson made numerous trips to Location A and asked Smith various questions about Appellant's move. R 249/158 (GL 31:14-24). Lawson insisted that Appellant would not be able to obtain a permit at Location B and stated that if Appellant tried, he would be "the first one up there to fight it" and that he would "fight it as hard as he can." R 249/62 (JB Depo 30:1-14). In an effort to prevent Appellant from obtaining a permit, Lawson told Appellee Ramsey that "they may be setting theirself up for a lawsuit" because "that building had been turned down before." R 249/159 (GL Depo 33:5-7) Lawson did not want Appellant to have a permit at Location B because he did not want any competition for his Location A right next door. R 249/159-160 (GL Depo 36:13 through 37:3); R 252.

After learning that the City had certified Appellant's permit, Lawson went to the offices of both Rounsavall and Appellee Ramsey to complain of the approval and certification because he wanted his premises, Location A, to be the only seller of beer and wine in the area. R 249/3-6, 109 (JR Depo 28:3-25), 110 (JR Depo 29:6 through 31:1), 115 (JR Depo 51:9-25), 125 (JR Depo 91:16-18), 158 (GL

Depo 31:17 through 32:25), 158-159 (GL 32:4 through 34:17), 160 (GL Depo 40:22:25), 208 (MGR Depo 65:12:21, 232 (MRG Depo 162:7-25, 233 (MGR Depo 163:1-6). Lawson also visited Tim Maloney, local TABC agent in Terrell, and asked him if Appellant had applied for a permit. R 249/158-159 (GL Depo 32:23 through 36:2). Lawson told Rounsavall, Appellee Ramsey and Maloney that Appellant "shouldn't have a license" because he thought Location B "was previously turned down for a license." R 249/158-159. Lawson complained about Appellant's permit because he did not want competition for his building. R 249/158-159 (GL Depo 36:13 through 37:3); R 252-253.

Once Lawson complained of the approval and certification, Appellees began to take action to prevent Appellant from obtaining the permit. R 253.

Rounsavall stated that he determined that the City's certification of Appellant's application for a permit for Location B had been issued in error because he thought that a new address number had been assigned to Location A, which he states occasionally occurs when additional numbers are added to a street. He stated that he took necessary actions to protest Appellant's application "pending a determination of whether selling beer and wine out of location B would be in violation of the City's ordinances" because he was "under the impression that one could not sell beer and wine from Location B." R 249/126 (JR Depo 93:4 through 96:15); R 253.

There is nothing to suggest or lead anyone to believe that Appellant's application for a beer and wine permit was a "change of address." This version of the City's position came to light after the lawsuit was filed as an attempt to justify the Defendants' true intentions. R 253; R 297/20 (MW Aff 2).

Instead of following TABC procedures and protesting the application based upon a valid statute or ordinance, Appellees asked Maloney to hold the application without notification to Appellant. R 249/73 (JB 73:4-8); R 297/2 (JB Aff 7).

On February 8, 2000, Appellant met with Maloney and told him that he wanted to obtain the permit as soon as possible. Maloney told Appellant to deliver him a stamped "overnight" envelope, and he would send the application to Austin that day. Appellant delivered such an envelope to Maloney that day. R 249/72 (JB Depo 72:16-25); R 254.

When he had not received a permit by February 24, 2000, Appellant contacted the service that had filed the application on his behalf and was told that the application had never been forwarded to the TABC in Austin. Appellant then called several state officials and requested help in locating the application. Eventually an employee of Texas State Senator David Cain's office told Appellant that the application was being held up by Appellee Ramsey because of a "proximity issue." R 249/69 (JB Depo 57:9 through 58:2); R 254.

After realizing his permit was being delayed, Appellant visited Appellee Ramsey, Rounsavall and Maloney to determine the reasons for the delay. On March 1, 2000, Rounsavall told Appellant that a school owned an athletic field was near Location B (and Location A) and gave Appellant a copy of a city ordinance. R 249/69-72 (JB Depo 60:1 through 67:3); R 254.

Appellant next visited Maloney, who said the City had told him to hold the application. Maloney would not tell Appellant who called him or when they called. R 249/73 (JB Depo 73:4-11), 74 (JB Depo 77:16-20); R 255.

Appellant made an appointment to see the city manager but the city manager canceled the meeting and told Appellant to discuss the issue with Appellee Ramsey. R 249/70 (JB Depo 62:11-22); R 255.

Appellant met with Appellee Ramsey and was told that there were some issues she would need to look at and that she would probably contact Appellant the next week. R 249/73 (JB Depo 73:16-18). Appellant gave Appellee Ramsey copies of the city ordinances, the permit the City had issued Appellant, and

Appellant's contract with George Calvert, from whom he had purchased Location B. Appellee Ramsey told Appellant that Location B was not eligible for a permit to sell beer and wine because it was located within 1,000 feet of an athletic field and a day care facility. R 249/73 (JB Depo 73:18-21). No disagreements with Lawson, rent, or locations other than Location A and Location B were discussed at this meeting. When asked by Appellant, Appellee Ramsey denied having talked to Lawson about the situation. R 249/70 (JB Depo 64:8 through 65:17); R 255; R 297/3.

On or about March 3, 2000, Appellant hired the law firm of Nacol, Wortham and Associates, P.C. to help him obtain a permit. R 249/174 (MW Depo 14:20 through 15:2) Michael P. Wortham ("Wortham") of Nacol, Wortham and Associates, P.C. wrote Appellee Ramsey on March 3, 2000 informing her that the position of the City, as she had represented to Appellant, was without merit and that there was no basis for the City's request that Maloney hold Appellant's application. R 249/175 (MW Depo 17:1-4)) The letter stated that the City ordinance did not mention day care centers and, as a result, the presence of day care centers such as The Children's Depot Learning Center and Our Kid's Tree House Child Care could not form a basis for a protest of Appellant's application; that the ordinance did not mention athletic facilities and athletic facilities such as the park mentioned by Defendants are not schools and could not form a basis for a protest; that there was no public school within 1,000 feet of the subject location; and that Terrell Christian Academy, a private school in the area, was not a public school. R 255-256; R 297/21 (MW Aff 4).

The letter also requested that Appellee Ramsey inform Wortham of her position on the matter as soon as possible because Appellant desired to begin selling beer and wine at location B on March 7, 2000 and could not do so without the permit. R 249/176 (MW Depo 23:14-23); R 256; R 297/21 (MW Aff 4).

Appellee Ramsey did not respond to the letter and after several days Wortham began attempting to contact her and Maloney by telephone. Appellee Ramsey was difficult to reach during this

time as she rarely took or returned calls. After not taking or returning his call for several days, Appellee Ramsey finally took a telephone call from Wortham. Initially, Appellee Ramsey would not communicate a reason for her opposition to the grant of Appellant's permit or the authority for such opposition, but stated that city employees needed to measure the distance between Location B and a day care center, school and park in the area before the City would consider certifying the application. R 249/175 (MW Depo 18:13-19), 177 (MW Depo 25:17-25), 180 (MW Depo 37:21-38); R 256; R 297/21 (MW Aff 5-6).

The measurements and the City's actions on the matter were delayed several times for various reasons, including Appellee Ramsey's alleged vacations and illnesses. Appellee Ramsey avoided Appellant's counsel and made up a variety of excuses to keep from discussing the City's protest or the reasons therefore or resolving the issues involved. R 249/180 (MW Depo 37:15 through 38:14); R 297/22. (MW Aff 7). Maloney would not give Wortham a reason for his refusal to forward the application to the TABC in Austin other than the fact that he had been requested to hold the application in order to allow the City to "protest" the permit. He would rarely talk to Wortham and would not ever state a valid reason to not forward the application to Austin for processing. R 249/181 (MW Depo 43:23 through 44:14); R 257; R 297/22 (MW Aff 8).

On March 9, 2000, Appellant was informed by the City building inspector's office that the inspection previously scheduled for Location B necessary for Appellant to obtain a certificate of occupancy had been "put on hold" but was not given a reason for same. On March 10, 2000, Will Cole, building inspector for the City, told Appellant that he had been instructed by Appellee Ramsey not to inspect Location B or grant a certificate of occupancy. After numerous telephone calls from Wortham to Appellee Ramsey, none which were taken or returned, and several discussions between Appellant and Cole, the certificate of occupancy was finally granted the next week. R 249/75-76 (JB Depo 82:7 through 86:24); R 257-258; R 297/22 (MW Aff 9).

Lawson procured tenants for Location A, the Rodriguzes. R 249/161 (GL Depo 41:14 through 42:4). On or about March 14, 2000, Lawson's attorney submitted a letter to Appellee Ramsey stating that the premises at Location A had been "grandfathered" to receiving a Beer and Wine Permit and the City's certification for said permit. R 249/1-2, 24, 218 (MGR Depo 106:19-22), 279; R 258.

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." See Tex. Alco. Bev. Code §109.59(a). Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." See Tex. Alco. Bev. Code §109.59(b)(emphasis added). R 258.

It is Appellants' position that because Lawson's tenants moved into Location A, where Appellant held a beer and wine permit for many years, their application satisfied the relevant distance requirements pursuant to the above statutes and that Location A was "grandfathered" into receiving a permit and certification from the City and the City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather" clause. R 249/114 (JR Depo 46:25 through 48:23); 225 (MGR Depo 132:8 through 133:8); R 258.

On April 14, 2000, Lawson's tenants obtained a Beer and Wine Permit for Location A. R 249/145 (HR Depo 13:8-9); R 259.

On or about March 14, 2000, Rounsavall notified Appellant via letter that the City was protesting Appellant's application for a

permit. No reason was given for the "protest." Rounsavall stated that the "protest is being filed pending our determination of compliance with our ordinance in regard to the location that is specified in the application" in regard to Location B. R 249/3-6, 118-119 (JR Depo 62:3-6, 62:20 through 63:9), 251; R 259.

On or about March 15, 2000, Appellant ceased operating from Location A and began operating from Location B. R 249/62 (JB Depo 32:6-10); R 259.

On or about March 15, 2000, Appellant filed an Original Petition for Declaratory Judgment and Injunction, Cause No. 56540, seeking that the Court enjoin the City and its agents from: (a) attempting to enforce Ordinance 1939 of the City against Appellant at Location B; (b) continuing to withhold its certification of Appellant's application for a permit; and (c) causing Maloney to deliver the applications and approvals to the TABC for final approval. R 249/7-9, 10-37, 177 (MW Depo 26:2-5, and 27:20-22); R 259-260.

In her deposition Appellee Ramsey testified that she ceased handling the case and Jason Marshall began representing the City on March 15, 2000. R 249/243 (MGR 203:4 through 204:24). However, Appellee Ramsey's role remained the same and she continued representing the City until May 31, 2000, as evidenced in her continued communications with Wortham and by the facsimile dated May 2, 2000 letter from Peter Smith of Nichols, Jackson, Dillard, Hager & Smith, L.L.P. to Wortham stating that his firm does not represent the City and to continue dealing with Appellee Ramsey.

Appellee Ramsey never stated to Wortham that she was not representing the City until the May 31, 2000 hearing when Marshall entered the case. R 249/183 (MW Depo 49:11-21); R 261; R 297/22-23 (MW Aff 10).

On or about March 15, 2000, Wortham sent an open records request to Rounsavall. Wortham did not have access to the City Ordinances of Terrell, and asked Appellee Ramsey if she would

send them but she refused to do so and suggested that he make an open records request. R 249/178 (MW Depo 29:5-19, 30:5-11, 31:4-20); R 261; R 297/23.

On or about March 17, 2000, Appellee Ramsey submitted a letter to Wortham stating that the reason for the City's protest of Appellant's application was that Location B "appears to be in violation of the City Ordinance and State Law in that the location is within 1,000 feet of an educational institution, namely Terrell Christian Academy." R 249/1-2, 178 (MW Depo 31:21 through 32:6), 202-203 (MGR Depo 44:15 through 45:1), 207 (MGR Depo 63:24 through 64:5), 210 (MGR Depo 73:7 through 74:2), 238 (MGR Depo 183:13-15), 252; R 261; R 297/23 (MW Aff 11).

On or about March 17, 2000, Wortham submitted a letter to Appellee Ramsey attempting to ascertain the statute or ordinance relied upon in her March 17, 2000 letter, resolve the dispute between Appellant and the City and to gain Appellee Ramsey's cooperation with regard several aspects regarding the lawsuit. The letter also contained information to support the fact that Appellant's business derived less than 50 percent of its gross receipts from the sale of alcoholic beverages; gave Appellee Ramsey the opportunity to review records supporting same and explained that the 1,000 foot restriction in the state statute was inapplicable to Appellant as a result. The letter also stated that pursuant to Section 109.33(a) of the Texas Alcoholic Beverage Code cities "may enact regulations" governing the sale of alcohol within parameters set out in the statute; that this statute merely enabled cities to govern the sale of alcohol if the cities so desire and sets up guidelines for the cities to follow in such regulation and that the statute does not purport to set up the regulations itself; that pursuant to Section 109.57 of the Texas Alcoholic Beverage Code cities may not be more restrictive than the state in regulating the sale of alcoholic beverages or attempt to regulate the sale of alcohol in a manner not stated in the Texas Alcoholic Beverage Code; that Ordinance No. 1939 attempts to regulate the sale of alcohol in a manner not provided for by the Texas Alcoholic Beverage Code and is more restrictive than the Texas Alcoholic Beverage Code. All of these facts were confirmed

in a telephone conversation between Wortham, Appellee Ramsey and Dewey Bracken, an attorney for the TABC. R 249/178 (MW Depo 32:7-10), 180 (MW Depo 39:24 through 43:3), 239 (MGR Depo 190:2 through 191:14; R 262; R 297/23 (MW Aff 23).

Appellee Ramsey did not respond to the letter but Wortham continued to attempt to contact her and discuss the matter with her. On or about March 21, 2000, Wortham sent Appellee Ramsey a letter outlining Appellant's sales and the percentage of said sales which were derived from beer and wine sales. R 249/117 (JR Depo 59:25 through 60:12), 182 (MW Depo 47:6-9, 48:1-20), 202 (MGR Depo 43:7-14), 213 (MGR Depo 87:7-15), 257; R 262-263; R 297/23 (MW Aff 12).

In a telephone conversation with Wortham or on about March 21, 2000, Appellee Ramsey stopped asserting the validity of Ordinance 1939 and began asserting that the City was protesting Appellant's application based upon an ordinance that prohibited the sale of alcoholic beverages in residential sections of the City even though Location B was in an area of the City zoned retail and not affected by the ordinance. R 249/183 (MW Depo 51:1-14), 266. She cited Chapter 5, Section 2D of the Code of Ordinances of the City of Terrell to Wortham and partially read it to him over the telephone and then transmitted it to him via facsimile on March 21, 2000. The ordinance reads as follows:

> "D. SALE IN RESIDENTIAL AREAS IS PROHIBITED
>
> The sale of alcoholic beverages, beer, and wine is prohibited within the residential sections of the city. For the purpose of this subsection, and as a matter of definition, all of the city lying within the corporate limits thereof shall be construed and is hereby designated as residential sections of the city, save and except those areas designated by the zoning ordinance, and amendments thereto, as commercial district (C), central area district (CA), retail district (R), light industrial district (LI), and

> heavy industrial district (HI). No store for the purpose of the sale of alcoholic beverages, wine, or beer will be located in any area of the city designated as residential. (Sec. 4-3, 1968 Code of Ordinances) R 263; R 297/23 (MW Aff 13).

After receiving and reviewing the ordinance, Wortham attempted to contact Appellee Ramsey but she would not take his telephone call. As a result, on or about March 23, 2000, after determining that Location B was zoned "Retail," Wortham sent a letter to Appellee Ramsey which stated that although the ordinance prohibits the sale of alcoholic beverages in residential sections of the City, Location B was in an area of the City zoned retail and not affected by the prohibition. R 249/183 (MW Depo 51:1-14), 266. She refused to change the City's position with regard to this matter. R 263; R 297/23-24 (MW Aff 14).

Without Appellant's knowledge, on March 21, 2000, Rounsavall sent an "Affidavit" to the TABC stating, among other things, that "[t]he application for Handy Mart No. 1 submitted by Appellant does not comply with the ordinances of the City regarding the sale of alcoholic beverages in residential areas." Rounsavall was relying on Section 2(D) of Chapter 5 of the City Ordinances. R 297/33-37. The City did not furnish a copy of the "Affidavit" to Appellant or his attorney. R 264; R 297/3 (MW Aff 8), 24 (MW Aff 15).

Sometime in late March, Maloney forwarded Appellant's application to the TABC in Austin. As a result, the action initiated by Appellant against the City on March 15, 2000 was nonsuited. R 249/32,177 (MW Depo 26:2 through 27:21); R 264.

On April 10, 2000, Brian Guenthner, Licensing Department Director for the TABC, sent a letter to Appellant stating that Appellant's application was incomplete and could not be approved due to the "the fact that the City has withdrawn their certification." R 144. The TABC took the position that the application would not be processed, granted or disapproved until the City certified whether

the sale of alcoholic beverages at subject location was prohibited by a City ordinance pursuant to Section 11.37 of the Texas Alcoholic Beverage Code as opposed to withdrawing its Certification. R 264; R 297/3 (JB Aff 9), 19.

Defendants allege that on April 12, 2000, Rounsavall submitted a letter to Maloney outlining the reasons for the protest of Appellant's application. More specifically, Rousavall explained that "the proposed establishment will be located within one thousand feet (1,000') of a public school or other educational institution located in a residential area." R 249/3-6, 101. A copy of this letter was not provided to Appellant until after this lawsuit was filed. R 265; R 297/3 (JB Aff 10), 24 (MW Aff 18).

Upon receipt of the April 10, 2000 letter from Guenthner, Wortham contacted Guenthner by telephone and Guenther stated that he had received the March 21, 2000 "Affidavit"from Rounsavall and reiterated the position set out in his April 10, 2000 letter. No mention was ever made by Guenthner to Wortham of the April 12, 2000, letter from Rounsavall to Maloney. Wortham asked for a copy of the March 21, 2000 "Affidavit" and was told by Guenthner to request same in writing. On April 18, 2000, Wortham sent Guenther a facsimile requesting all documentation in the possession of the TABC regarding Appellant, including the March 21, 2000 "Affidavit." R 265; R 297/24 (MW Aff 17-18).

On or about April 26, 2000, Guenthner sent Wortham the TABC file regarding Appellant's application. The April 12, 2000 letter was not a part of that file. R 265; R 297/25 (MW Aff 17).

After receipt of the letter from Guenthner containing the TABC file and the March 21, 2000 "Affidavit," on May 2, 2000, Wortham sent a letter to Appellee Ramsey stating that he had become aware of the March 21, 2000 "Affidavit" and that the position set out in the "Affidavit" was the last position that had been relayed from Appellee Ramsey to him and once again outlined Appellant's position that the City should certify Appellant's application. R 249/185 (MW Depo 58:9-19), 271; R 297/25 (MW

Aff 18). Wortham also sent a copy of the same letter to Peter Smith, who responded that same day telling Wortham that his firm did not represent the City and to continue dealing with Appellee Ramsey. R 249/7-9, 33-53, 177; R 265-266; R 297/22 (MW Aff 10).

As a result of the position taken by the City in Mr. Rounsavall's "Affidavit" and Appellee Ramsey's failure to communicate with Wortham, on May 5, 2000, Appellant filed an Original Petition for Writ of Mandamus, Cause No. 56794, seeking, inter alia, that the Court issue a writ of mandamus requiring the City and Rounsavall to certify the Appellant's application. R 249/185 (MW Depo 58:9-19); R 271; R 266.

On the day of the hearing on the petition, May 31, 2000, the City filed Defendants' Original Answer and Plea to the Jurisdiction, which stated that "Appellant's establishment is not in compliance with City Ordinances limiting the sale of alcoholic beverages within 1,000 feet of a public school or other educational institution. . . " The City asserted that it was not relying on Chapter 5, Section 2D, but on Ordinance 1939 because the subject location was within 1,000 feet of a private school. As a result, the hearing was canceled. At the hearing, Jason Marshall stated to the Court that he had been retained to represent the City on May 30, 2000. After this date, Defendants began looking for a way that Appellant could be granted his permit in a manner that would allow Defendants to "save face." R 266-267; R 297/25 (MW Aff 20).

Appellant then filed Relator's Second Amended Original Petition for Declaratory Judgment, Injunction and Writ of Mandamus which was set for hearing on June 27, 2000. R 267; R 297/25 (MW Aff 20).

On or about June 15, 2000, Marshall submitted a letter to the TABC articulating the City's position that the TABC should grant Appellant's application for a permit over the City's objection. R 249/7-9, 273. The City refused to withdraw its objection. R 267; R 297/26 (MW Aff 21).

On or about June 28, 2000, the Kaufman County District Court dismissed Appellant's case. R 249/7-9, 54. Lawson, Cole, Appellee Ramsey, and Maloney all appeared at one or both of the hearings and socialized before the hearings began. R 249/64 (JB Depo 119:12-25), 166 (GL Depo 62:13-18). Lawson testified in his deposition that he did not know Cole, but socialized with him as stated above. R 267; R 297/26 (MW Aff 22).

On or about July 27, 2000, Rounsavall submitted a letter to the TABC withdrawing the City's protest of Appellant's application, explaining that "[t]he applicant has provided information to the Attorney representing the City of Terrell in this case to certify that while the proposed premises will be within 1000 feet of a public school, based upon information provided by the Applicant, less than 50% of the gross sales, excluding gasoline sales, will be from the sale of beer and wine, making the City's 1000 foot distance requirement inapplicable." R 249/3-6, 72 (JB Depo 71:3-6), 86 (JB Depo 125:20 through 126:7), 102, 121 (JR Depo 74:9-18), 122 (JR Depo 79:11-15), 130 (JR Depo 111:21 through 112:7), 277. The information referred to by Rounsavall had been provided and/or made available to the City beginning in March 2000. At any time between early March, when Defendants became aware of this information, and July 27, 2001, Defendants could have withdrawn the protest or otherwise stopped blocking the application for these reasons. In August 2000, Appellant obtained certification and a Beer and Wine Permit for Location B. R 249/60 (JB Depo 24:11-25), 71 (JB Depo 68:22-25), 86 (JB Depo 126:16-19; R 297/26 (MW Aff 23). However, as a result of the conduct of Appellees, Appellant was forced to sell the store due to lost profits and ruined product. R 267-268.

B. Disposition of Issue Below

The United States Court of Appeals for the Fifth Circuit affirmed the summary judgment granted by the trial court.

REASONS FOR GRANTING THE PETITION

A. The Circuits are divided in their interpretation of *Village Willowbrook* and whether animus or ill will is necessary to prosecute a "class-of-one" equal protection or selective enforcement claim.

In *Village of Willowbrook, et al. v. Olech*, 528 U.S. 562 (2000), the Supreme Court, in a per curiam opinion, held that the Equal Protection Clause gives rise to a cause of action on behalf of a "class of one" even when the plaintiff does not allege membership in a protected class or group if the plaintiff has been intentionally treated differently from others similarly situated and there is no rational basis for this difference in treatment. The Supreme Court set out no requirement that a plaintiff must allege "an illegitimate animus or ill-will motivated his intentionally different treatment from others similarly situated and that no rational basis existed for such treatment." R 276.

The Supreme Court stated that "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (R 276)

In *Olech*, the plaintiff alleged that the defendant had intentionally demanded a 33-foot easement as a condition of connecting the plaintiff's property to the municipal water supply when it required only a 15-foot easement from other similarly situated property owners; that this demand was "irrational and wholly arbitrary" and that the Village ultimately connected the plaintiff's property after receiving a clearly adequate 15-foot easement. R 276.

In our case, the City protested Appellant's application despite having no basis to do so and approved the application of Appellant's neighbor, Lawson's tenant in Location A, to receive a permit. The Defendant's conduct in doing so was "irrational and

wholly arbitrary." The City ultimately withdrew its protest after determining that it should not have protested initially. R 277.

The Supreme Court held that the allegations in *Olech*, "quite apart from the *Village's* subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. R 276.

The lower court in *Olech* required a plaintiff produce evidence of the defendant officials' subjective motivation, but not necessarily evidence of similarly situated persons who were treated differently. The Supreme Court's explanation, on the other hand, requires a plaintiff to produce evidence that similarly situated persons were treated differently, but not any evidence of the defendant's subjective motivation for conduct being challenged. 528 U.S. at 564 (recognizing an equal protection claim where a plaintiff alleges different treatment from others similarly situated); id at 565 (indicating that the Court's decision was not based on the theory of "subjective ill will"). The Supreme Court explicitly distanced itself from the "subjective ill will" theory. Id at 565. The majority decision in fact expressly disavows subjective ill will. Id. ("These allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis.") The Court specifically noted that "(we) do not reach the alternative theory of 'subjective ill will' relied on (by the Seventh Circuit." Id at 565.

The *Olech* decision makes it clear that when a person is subjected to different treatment that is "irrational or wholly arbitrary" he may bring a claim under the Equal Protection Clause. 528 U.S. at 563.

While *Olech* allows a "class of one" claimant to bring a claim under the Equal Protection Clause, the Court did not provide a clear standard for analyzing such claims.

After the decision in *Olech*, Judge Posner of the Seventh Circuit articulated a standard for "class of one" claims, and other circuits have developed different standards. In *Hilton v. City of*

Wheeling, 209 F.3d 1005 (7th Cir 2000), the Seventh Circuit held "that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." Id at 1008. Thus, in the Seventh Circuit, it appears that a plaintiff must show some equivalent of "ill will" or animus to proceed under a "class of one" claim.

The Fifth Circuit, in *Bryan v. The City of Madison*, 213 F3d 267 (5th Cir 2000), cert. denied, 531 U.S. 1145 (2001), stated in a footnote that that *Olech* did not change the Fifth Circuit requirement of improper motive. Id at 277 n. 14. ([*Olech*] does not . . . alter our requirement of an improper motive, such as racial animus, for selective enforcement claims.) The Fifth Circuit held that "to successfully bring a selective enforcement claim, a plaintiff must prove that a government official's acts were motivated by improper considerations, such as race, religion, or the desire to prevent a constitutional right." Id. at 268. Addressing *Olech*, the Fifth Circuit stated "(*Olech*) merely stands for the proposition that single plaintiffs may bring equal protection claims . . . (b)ut this statement has nothing to do with whether they must assert membership in a larger protected class. The decision does not, therefore alter our requirement of an improper motive, such as racial animus, for selective enforcement claim." Id at 277 n. 17.

The Fourth Circuit, in *Greenspring Racquet Club, Inc. v. Baltimore County*, 2000 WL 1624496 (4th Cir. Oct. 31, 2000) (unpublished opinion) dismissed a claim where a developer alleged a restrictive zoning change was "adopted in bad faith, with an intent to discriminate against (the plaintiff)." Id at *2. The Fourth Circuit applied traditional Equal Protection analysis requiring only a rational relation between the decision and a legitimate government interest in rejecting the claim. The Court noted that the *Olech* decision did not change fundamental equal protection jurisprudence. "Where an obvious legitimate purpose is evident on the face of a challenged law, an equal protection claim under rational basis review must fail." Id.

The Second Circuit has also had trouble interpreting the meaning of *Olech*. Before *Olech* the Second Circuit had already developed a two-part test in cases of selective treatment that anticipated the alternative interpretations of *Olech*. In *LeClair v. Sanders*, 627 F.2d 606 (2nd Cir. 1980), the Second Circuit considered an allegation of an equal protection violation in the selective enforcement of a dairy farm regulation. Id at 607-08. The court explained that liability would depend on proof that (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Id. at 609-610.

The Second Circuit has had a difficult time in determining exactly how much is left of the LeClair Standard after *Olech*. In three separate attempts at explaining the effect of *Olech*, the Second Circuit did not resolve the issue of whether a plaintiff must prove both elements of the LeClair standard or only one of them. See *Giordano v. City of New York*, 274 F.3d 740 (2d Cir. 2001); *Harlen Assocs. v. Vill. Of Mineola*, 273 F.3d 494 (2d Cir 2001); *Gelb v. Bd. Of Elections*, 224 F.3d 149 (2d Cir. 2000). In each of the cases, the court found that it did not need to decide that issue because in each case, the plaintiff was unable to prove either element.

At nearly the same time in the Second Circuit, in *Jackson v. Burke*, 256 F3d 93, 2nd Cir (N.Y.) July 11, 2001, the United States Court of Appeals for the Second Circuit addressed an inmate's Equal Protection "class of one" claim. The Court, when citing *Olech*, specifically stated, "proof of subjective ill will is not an essential element of a 'class of one' equal protection claim." However, the most recent cases from the district courts within the Second Circuit now seem to be of the view that in order to make a "class of one" claim, a plaintiff must prove either intentionally different treatment of similarly situated persons or subjective ill will.

The Federal District Courts are split in the application of *Olech*, specifically regarding whether subjective ill-will is necessary

for a class of one claim. In deciding that the plaintiff in *Olech* had a valid claim under the Equal Protection clause, the Supreme Court stated that "previous cases have recognized successful equal protection claims brought by a class of one where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. at 564. The Court applied this reasoning to the set of facts in *Olech*. The allegations that the Village of *Olech* treated the plaintiff differently than others similarly situated was enough to state a claim for which relief could be granted under traditional equal protection analysis. The Court did not reply on the theory of "subjective ill will" as applied by Judge Posner in the Seventh Circuit.

Since the Circuit Courts are divided in their interpretation of *Olech*, the Supreme Court should clarify its *pur curiam* ruling and clearly set forth the requirements of a "class of one" equal protection claim.

B. The Decision of the Court of Appeals is Erroneous; Evidence of Improper Motive of the Defendants Exists.

As set out above, it is not necessary to prove that illegitimate animus or ill-will motivated the Defendants' conduct to bring a "class of one" equal protection claim.

Notwithstanding the above, Appellees herein deliberately sought to deprive Appellant of his permit and equal protection of laws for reasons of a personal nature and took a variety of actions to prevent him from obtaining a permit even though the actions were not supported by law or fact. R 277.

The acts of Appellees support the fact that their actions were improperly motivated:

(1) Appellee Ramsey adopted a variety of meritless positions to support the City's protest of Beeler's license, ignoring the law and facts.

(2) Each time Appellee Ramsey received an explanation as to why her position was meritless she changed positions, adopting a new position and basis therefore.

(3) Instead of following recognized procedures, Defendants secretly requested Maloney to "hold" Beeler's application.

(4) Appellee Ramsey would not take or return Wortham's telephone calls, and gave a variety of excuses to avoid dealing with the case, including vacations, dealing with her children and the fact that the case was not a priority with her.

(5) Once Marshall began representing the City, the City began looking for a manner in which Beeler could be granted a license while the City "saved face."

(6) The City opposed Beeler only after being approached by Lawson; Rounsavall's story regarding the change of address is implausible.

(7) The City withdrew its protest in late July for reasons it was aware of in March.

(8) Lawson did not like Beeler because Beeler terminated his lease with him and had a dispute with him regarding Beeler's alleged violation of the provisions of his lease agreement.

(9) Defendants knew Beeler would be in serious financial trouble without the permit.

(10) Beeler was from Missouri and lived in Dallas; Lawson lived in Terrell and has known Appellee Ramsey for most of her life.

(11) The same ordinances and statutes should have been applied uniformly to Beeler in Location B and Lawson's tenant in Location A.

(12) Defendants used the "grandfather clause" position to help Lawson's tenant get a permit.

(13) The City recognized state laws when convenient (using the grandfather clause as an excuse to grant Location A a license and exempting Beeler on July 27) and did not recognize state laws when convenient. (Ordinance 1939 not affected by state laws.)

(14) Appellee Ramsey responded to Mallard but not to Wortham.

(15) A copy of Rounsavall's April 12 letter to the TABC was not provided to Beeler until the litigation began.
R 282-283.

C. The Court erred in determining that Appellant's new store, Location B, was not similarly situated to the site of his old store, Location A and that he was not treated differently than the proprietor of the store at Location A.

The Texas Alcoholic Beverage Code provides "[i]f at the time an original alcoholic beverage permit or license is granted for a premises the premises satisfied the requirement regarding distance from schools, churches and other types of premises established in this code and any other law or ordinance of the state or a political subdivision of this state in effect at that time, the premises shall be deemed to satisfy the distance requirements for all subsequent renewals of the license or permit." See Tex. Alco. Bev. Code §109.59(a).

Moreover, the code provides "[o]n the sale or transfer of the premises or the business on the premises in which a new original license or permit is required for the premises, the premises shall be deemed to satisfy any distance requirements as if the issuance of the new original permit or license were a renewal of a previously held permit or license." See Tex. Alco. Bev. Code §109.59(b)(emphasis added). R 258.

It is Appellees' position that because the Rodriguez'tenants moved into Location A, where Appellant held a beer and wine permit for many years, their application satisfied the relevant distance requirements pursuant to the above statutes and that Location A was "grandfathered" into receiving a permit and certification from the City and the City and Rounsavall certified the Rodriguez' application for Location A based on the "grandfather" clause. R 249/114 (JR Depo 46:25 through 48:23); 225 (MGR Depo 132:8 through 133:8); R 258.

The Court held that Appellant must demonstrate that he and Lawson's tenants, the Rodriguezes, were similarly situated and were treated differently as a prerequisite to an equal protection claim. The Court stated that since a permit had never been issued for Location B, Appellant's site, the application was treated as an application for a new permit. The Court also stated that since permits were issued for Location A, the Rodriguez site, to Appellant and others for more than a decade, the Rodriguez application was treated as the renewal of a permit as opposed to an application for a new permit. This is error. The Rodriguezes were applying for a new permit. It is undisputed that they had never held a permit at Location A, did not purchase Location A and did not purchase Appellant's business or anyone's business located at Location A. The Rodriguezes opened a new business in a building they rented that had previously housed a business that had held a permit. Their application was an application for a new permit, as was Appellant's.

Appellant was treated much differently than the Rodriguezes. The Rodriguezes' application was delayed for less than two weeks and was quickly certified once the City learned that Lawson supported the certification. The City delayed Beeler's permit for more than five months despite the fact that (1) Beeler had pointed out to city officials that there was no basis for not certifying the permit and city officials knew there was no basis for doing so, (2) the City had previously represented to Beeler that beer and wine could be sold from the subject property, (3) the TABC had informed the City that beer and wine could be sold from the subject property, (4) the City

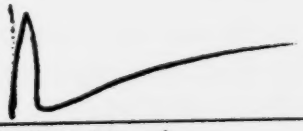
had certified the Rodriguezes' permit and the Rodriguezes were selling beer and wine from Location A.

CONCLUSION

The Circuit Courts are unsure how to apply the Supreme Court's ruling in *Olech*, and need clarification as to the necessary elements of a "class of one" equal protection claim.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed May 7, 2003

NO. 02-10360

Charles R. Fulbruge III, Clerk

JON BEELER,

Plaintiff-Appellant,

versus

JOHN ROUNSAVALL, MARY GAYLE RAMSEY, and THE CITY OF TERRELL, TEXAS,

Defendants-Appellees.

Appeal from the United States District Court
For the Norther District of Texas

Before BENAVIDES, STEWART, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

The issue on appeal is whether the district court erred in granting summary judgment in favor of John Rounsavall ("Rounsavall"), City Secretary; Mary Gayle Ramsey ("Ramsey"), City Attorney; and the City of Terrell, Texas, ("the City") on the appellant's "class of one" equal protection claim. We affirm. [Page 1]

I. FACTS AND PROCEEDINGS

Under the Texas Alcoholic Beverage Code ("the Code"), an operator of a convenience store must apply for a beer and wine permit ("permit") if beer and/or wine will be sold at the location. TEX. ALCO. BEV. CODE §§11.01(a), 11.31, 11.32. The Texas Alcoholic Beverage Commission ("TABC") has the discretionary authority to grant or refuse requested permits. *Id.* §§ 11.01(a), 11.43, 11.46.

Under the Code, incorporated cities and towns may regulate the sale of beer and wine. *Id.* §§ 109.31-33. Pursuant to this authority, the City passed two ordinances in 1984 and 1998, respectively, that established distance requirements for businesses

selling alcoholic beverages. The first ordinance ("Ordinance 1345") prohibited the sale of beer and wine from any locations that were within 300 feet of a church, school, or other educational institution, and the second ordinance ("Ordinance 1939") restricted the sale of beer and wine within 1000 feet of a public school or other educational institution.

The practical effect of Ordinance 1939 was somewhat minimized by the Code's differential treatment of applications for new permits and applications to renew existing permits. *Id.* §§ 11.31, 11.32. Under the Code, businesses applying for permits only needed to satisfy the distance requirements in existence at the time of their original application. Under the Code's grandfather clause, all businesses that obtained their permits prior to the passage of Ordinance 1939 were deemed "to satisfy the distance requirements for all subsequent renewals of the...permit," even if this was not true as a factual matter. *Id.* § 109.59. Of course, businesses applying for their first permit after the passage of Ordinance 1939 were required to satisfy the distance requirements contained therein. *Id.* §§ 109.31-33, 109.59.[Page 2]

In 1990, Appellant Jon Beeler ("Beeler") purchased an ongoing business--a convenience store— at 307 Ninth Street in Terrell, Texas ("Location A"). Beeler did not own the building in which his business operated or the land upon which it was situated, instead, he rented the building from Grady Lawson ("Lawson"). When Beeler purchased the business, Location A already had a permit.

In December 1999, Beeler decided to relocate his business from Location A to 305 Ninth Street in Terrell, Texas ("Location B"). Location A and Location B were adjacent buildings. Whereas the TABC had issued permits for Location A in the past, no such permit had ever been issued for Location B.[1]

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[1] Based on rumors he had heard, Lawson believed that it was not possible to sell alcoholic beverages at Location B. Beeler contended that his employee attempted to confirm the veracity of these rumors in early 1998 by contacting Rounsavall, who allegedly stated that the issuance of a permit would not violate any City

Under the Code, the City, through its City Secretary, must certify "whether the location or address given in the application is in a wet area and whether the sale of alcoholic beverages for which the permit is sought is prohibited by charter or ordinance." *Id.* § 11.37(b). On January 11, 2000, Beeler applied for a permit for Location B, and on or about the same day, the City certified that Beeler could sell beer and wine out of Location B.[2] On January 12, 2000, Beeler purchased the building located at Location B. Around the same time, Lawson found new tenants—Humberto and Ly Rodriguez ("the Rodriguezes")—to operate a convenience store at Location A. [Page 3]

Shortly after Beeler's purchase of the building at Location B, Lawson visited Rounsavall and Ramsey to question the City's certification of Beeler's application. Lawson believed that Location B had been denied a permit in the past.

Subsequently, Rounsavall determined that the City's certification was in error, so he took the necessary steps to file a protest of his certification. Rounsavall attributed his flip-flop to the mistaken belief that a new address number had been assigned to Location A. According to his affidavit, Rounsavall had not understood that Beeler was changing locations. As a result, Beeler's application was put on hold, and the City attempted to ascertain whether to certify Beeler's application.

The City's determination was delayed by bureaucratic inertia, Ramsey's personal vacations and illnesses, failure to measure the relevant distances, and disagreements over whether Ordinance 1939 applied to day care facilities, private schools, and/or athletic facilities. On March 14, 2000, Rounsavall notified Beeler that the City was protesting his application pending a determination of compliance with the relevant municipal ordinances, including Ordinance 1939.

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ordinances. However, there is no evidence in the record of such a conversation.

[2] The City provided Beeler with an official document entitled "Permit," which bore the signature of Rounsavall and noted the address of Location B (905 Ninth Street, Terrell, Texas 75160), the duration of the permit (one year), and the name of the establishment (Handy Mart #1). R. 249/100.

The next day, Beeler sought a declaratory judgment and injunction from the district court enjoining the City from enforcing Ordinance 1939, withholding its certification, and causing his application to be placed on hold. Shortly thereafter, the TABC considered Beeler's application and concluded that it could not approve it because the City withdrew its certification. As a result, Beeler's original action was nonsuited, and Beeler sought a writ of mandamus from the district court requiring the City and Rounsavall to certify his application. Beeler's second action was dismissed in late June 2000, but the next month, Rounsavall withdrew the City's letter of protest after determining that Location B satisfied the relevant municipal ordinances.

In August 2000, the City certified Beeler's application, and he received his permit. [Page 4] Subsequently, Beeler sold the store located at Location B.

The Rodriguezes also had difficulty obtaining a permit for their convenience store at Location A. On March 14, 2000, just before the Rodriguezes began operating their store, Lawson's attorney wrote to Ramsey to protest the "delay and refusal" of the City to certify the Rodriguezes' application. Evidently, the City was considering whether Location A satisfied the distance requirements established by Ordinance 1939. Lawson's attorney asserted that the Code's grandfather clause applied to Location A because the Rodriguezes were operating the same type of store at a location for which permits had been issued in the past. On April 14, 2000, the Rodriguezes obtained a permit for their store at Location A.

On November 6, 2000, Beeler filed suit against Rounsavall, Ramsey, and the City (collectively, "the Defendants") in the district court, arguing that their actions deprived Beeler of equal protection in violation of the Fourteenth Amendment. The district court characterized Beeler's claim as a "class of one" equal protection claim that required two findings: (1) illegitimate animus or ill will on the part of the Defendants, and (2) similarly situated individuals were treated differently. The district court concluded that Beeler and the Rodriguezes were not similarly situated and that the Defendants' behavior, though reprehensible, did not rise to the level of illegitimate animus or ill will. For this reason, the district court granted summary judgment in favor of the Defendants.

II. STANDARD OF REVIEW

This Court reviews a motion for summary judgment de novo. *St. Paul Guardian Ins. Co. v. Centrum GS Ltd.*, 283 F.3d 709, 712-13 (5th Cir. 2002). The purpose of summary judgment is to pierce the pleadings and assess the proof to determine if a genuine need for trial exists. *Matsushita* [Page 5] *Elec. Indus., Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. DISCUSSION

The instant dispute is not a straightforward equal protection claim involving a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The instant dispute is more akin to the plaintiffs' claims in *Bryan v. City of Madison*, 213 F.3d 267, 276-77 (5th Cir. 2000), in which public officials repeatedly frustrated the plaintiff's plan to construct an apartment complex on land he contracted to purchase, and *Esmail v. Macrane*, 53 F.3d 176, 178-80 (7th Cir. 1995), in which public officials used their powers to delay and frustrate an applicant's efforts to obtain a liquor license. Like the plaintiff in *Bryan*, Beeler alleged that (1) the Defendants applied the municipal ordinances, including the distance requirements established by Ordinance 1939, unreasonably in his case by frustrating his application for a permit based on a failure to comply with those ordinances; and (2) the extraordinary process he faced, including the delays from March to August 2000, violated his equal protection rights. *Bryan*, 213 F.3d at 276.

"The first [claim] falls within the standard equal protection analysis. As a prerequisite to such a claim, the plaintiff must prove that similarly situated individuals were treated differently." *Id.* (citing *Wheeler v. Miller*, 168 F.3d 241, 252 (5th Cir. 1999)). In order to satisfy this prerequisite, Beeler must demonstrate that: (1) Beeler and the Rodriguezes were similarly situated, and (2) Beeler and the Rodriguezes were treated differently. [Page 6]

First, the Code clearly distinguishes between applications for new permits and applications to renew existing permits. TEX.

ALCO. BEV. CODE §§ 11.31, 11.32, 109.59. Permits were issued for Location A on a continual basis for more than a decade, but never for Location B. For this reason, the Rodriguezes' application was treated as one to renew an existing permit and Beeler's application as one for a new permit. Under the Code's grandfather clause, the distance requirements established by Ordinance 1939 only applied to Beeler's application, not to the Rodriguezes' application. *Id.* § 109.59.

Beeler argues that he was similarly situated to the Rodriguezes because the two stores were located in adjacent buildings and sold the same basic items. However, the relevant criterion here is not the two stores' proximity or the similarity of their products. Instead, the relevant question is whether the two stores were similarly situated under the Code. The Code's differential treatment of businesses applying for their first permit and businesses applying to renew their permits indicates that Beeler and the Rodriguezes were not similarly situated. Whereas Beeler was applying for a new permit, the Rodriguezes were applying to renew an existing permit. Beeler did not cite any other parties applying for new permits; therefore, Beeler failed to satisfy the first element.

Second, there is no evidence that Beeler was treated any differently from the Rodriguezes. On March 14, 2000, Lawson's attorney wrote to Ramsey complaining about the City's "delay and refusal" to certify the Rodriguezes application for a permit based on the failure of Location A to comply with the distance requirements contained in Ordinance 1939. Although the Rodriguezes received their permit before Beeler, the City appears to have treated the two parties in a similar manner by initially refusing to certify their applications and causing unnecessary delays. Therefore, Beeler failed to satisfy the second element. [Page 7]

The second claim is more properly characterized as an example of selective enforcement. *Bryan*, 213 F.3d at 277; *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 2000). "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Allred's Produce*, 178 F.3d at 748 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). "[T]o successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were

motivated by improper considerations, such as race, religion, or the desire to prevent the exercise of a constitutional right." *Bryan*, 213 F.3d at 277. "[I]t must be shown that the selective enforcement 'was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Allred's Produce*, 178 F.3d at 748 (citing *Oyler*, 368 U.S. at 456).

Beeler's selective enforcement claim fails to satisfy this requirement. He has never alleged any improper motive by the Rounsavall, Ramsey, or the City. Indeed, Beeler offers no motive at all for the Defendants' actions.[3]

This Court stated that personal vindictiveness might be an improper motive in a selective enforcement case, but this Court has "never specifically addressed whether such a motive would be enough to support an equal protection claim without some other class-based discrimination." Id. At 277, n.18. The "text of the Equal Protection Clause, the history leading to its adoption, [and] a century of jurisprudence that has in the main interpreted the clause to prohibit only disparate treatment based upon group or class factors" suggests that personal vindictiveness by itself is insufficient as an improper motive in the absence of some other class- or group-based [Page 8] discrimination. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY.L.J. 69, 75 (2000/2001). However, we need not address this issue here because Beeler has not provided any evidence of personal vindictiveness.

IV. CONCLUSION

Viewing the evidence in the light most favorable to the non-moving party, we conclude that Beeler has not provided any evidence of similarly situated individuals, of different treatment, or of improper motives on the party of the Defendants or Lawson. Having pierced the pleadings and assessed the proof to determine if a genuine need for trial exists, we conclude that there is no genuine issue as to any material fact, and Rounsavall, Ramsey, and the City are entitled to a judgment as a matter of law. The judgment of the district court is AFFIRMED. [Page 9]

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[3] In his Deposition, Beeler conceded that neither Rounsavall nor Ramsey ever expressed any hostility toward him.